October 26, 2007

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P. O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, ON, M4P 1E4

Subject: Notice of Proposal to Amend the Affiliate Relationships Code
Board File No: EB-2007-0662

In response to the Ontario Energy Board's ("the Board") Notice of September 19, 2007 regarding the proposed amendments to the Ontario Affiliate Relationships Code for Electricity Distributors and Transmitters (the "Electricity ARC"), the Coalition of Large Distributors ("CLD") consisting of Enersource Hydro Mississauga, Horizon Utilities, Hydro Ottawa, PowerStream, Toronto Hydro-Electric System Limited and Veridian Connections, wishes to offer the following comments.

In responding, the CLD has focused on how the objectives of the Electricity ARC can be effectively incorporated into the operational activities of distributors, in order to maximize the desired benefits. The CLD still maintains the positions set out in the letter of comments sent to the Board on July 20, 2007. The CLD has also reviewed the submission put forth by the Electricity Distributors Association ("EDA") and supports the EDA's proposed changes to the Electricity ARC.

In summary, the CLD's four principal concerns with the proposed amendments to the Electricity ARC are as follows:

1. A principal objective of the Electricity ARC must be the promotion of economic efficiency and cost effectiveness for the distributors. The CLD's comments set out in Sections 2.3.3.4 and 2.3.4 relate to achieving this objective.

2. The objective ("e") relating to "unfair business advantage" should be eliminated unless and until clarified since this concept is not defined and appears to have been interpreted in the draft ARC to mean "any competitive advantage" (e.g. Section 2.6.4).

3. Section 2.6.1 is sufficient for the protection of confidential information and section 2.2.3, prohibiting sharing of employees who have access to confidential information with an energy service provider affiliate, should be modified to preclude the "use" of confidential information rather than "access" to the information.

4. Section 2.6.4 prohibiting the sharing of strategic business information with energy service provider affiliates should be removed. The examples of strategic business information include information that is readily provided upon request to any party, affiliate or non-affiliate. If this code amendment proceeds, as written, the only fair approach would be to start denying this information to anyone so that non-affiliates do not have a competitive advantage.

   Examples of sharing strategic business information include corporate strategic meetings, business plans for shareholder municipalities and holding companies, which are necessary for good corporate governance. This code amendment is not viable as written and appears to inappropriately flow from the ARC objective of prohibiting "unfair business advantage".

Section 1.1 – Purpose of this Code

Of the six (6) code objectives, it is the view of the CLD that a) is the underlying objective of the Board's goal of protecting ratepayers from potential harm that may result from distributor interactions with their respective affiliates. The remaining five objectives listed are specific actions or requirements that support the achievement of the Board's no harm objective.

With reference to the objective of preventing an unfair business advantage to an affiliate that is an energy service provider, the CLD seeks guidance as to what constitutes an "unfair" business advantage. A business advantage does not necessarily make a utility anti-competitive.

Furthermore, the proposed amendments do not include an objective for the Electricity ARC that relates to a legislated mandate of the Board; that is, "To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry". The *Ontario Energy Board Act ("OEB Act")* sets out only two objectives for the Board. To have a code that ignores one of these two objectives is inappropriate.

Section 1.2 Definitions

Regarding 'shared corporate services', regulatory, facility, procurement and information services, among other possible examples, are not included even though these are similar in nature to the services that are listed. In order to ensure there are no unintended restrictions, it is recommended that the definition be extended to include "and other common services."

Although changes in the definition of 'confidential information' have not occurred, the Board's proposal to limit the prohibition on sharing of employees with energy service providers to only those employees with access to 'confidential information' provides distributors with greater flexibility to allocate resources more efficiently. Nevertheless, as stated in the CLD's original

submission, more efficiencies could be achieved that would benefit our customers, while maintaining the desired protections, by prohibiting the "use of" confidential information rather than the "access to" confidential information. This is dealt more fully in Section 2.2 below.

Section 2.1 – Degree of Separation

The amendment to eliminate the requirement that a utility be physically separated from an affiliate that is an energy service provider will provide utilities with greater flexibility in achieving efficiencies.

Section 2.2 – Sharing of Services and Resources

Section 2.2.2 should also provide direction on the requirements for and frequency of Section 5970 CICA Handbook reviews. If the Board plans to enforce this compliance requirement, then direction as to the frequency of such reviews is requested. The CLD suggests that the frequency reflect the benefits relative to the associated costs of undertaking such reviews.

As stated earlier, appropriate flexibility and protections would also be achieved by basing the principle behind Section 2.2.3 on the "use of" rather than "access to" confidential information. There are significant cost benefits available to LDCs and their customers from sharing management and operational costs, however, many utility employees have access to some form of confidential information and Section 2.2.3 would preclude achievement of those efficiencies. Section 2.6.1 of the ARC requires LDCs to not "use" confidential information for any purpose other than for which the information was collected or the customer has, otherwise, allowed. LDCs have already established proper controls under MFIPPA and PIPEDA legislation to ensure that customer information is used only for its intended purpose and section 2.2.3 should therefore be modified to "Employees who are directly involved in collecting, or have access to, confidential information and provide a service to an affiliate that is an energy service provider, shall not use confidential information for any affiliate purpose."

The exemption of the transfer pricing rules during emergency situations, as outlined in the new Section 2.2.4, is appropriate in such circumstances.

The elimination of the prior Section 2.2.4 prohibiting the sharing of employees involved in day-to-day operations with an energy service provider affiliate will offer increased flexibility in sharing resources and finding efficiencies, without any negative outcomes.

Section 2.3 – Transfer Pricing

2.3.1 Terms of Contracts with Affiliates

The introduction of a maximum five-year limit on Affiliate Contracts, with the option to exceed this duration with Board approval, strikes a manageable balance between the costs of establishing contracts and the need for associated costs to reflect more current market conditions.

That said, the CLD notes the importance of a simple and efficient process for obtaining approval for longer durations, in order to ensure negotiations for the provision of services are not impeded.

2.3.2 Outsourcing to an Affiliate

2.3.2.1

The proposed threshold for establishing a business case for Affiliate Contracts equal to or greater than $100,000 or 0.1% of the utility's revenue (non-commodity), annually, is a reasonable balance between the associated administrative costs and expected ratepayer protections.

2.3.3 Where a Market Exists

2.3.3.3.

Exempting new or renewing contracts with an annual value of less than $100,000 or 0.1% of the utility's revenue, whichever is greater, from a formal competitive tendering or bidding process is in line with many existing utility procurement practices. In the absence of specific criteria regarding the degree of benchmarking or market pricing required, it is expected that existing procurement policies, which are designed to satisfy legal fiduciary obligations should be sufficient for ARC purposes and there is no need to specifically require a tendering process in the ARC.

2.3.3.4

The CLD opposes the requirement of obtaining an independent evaluation for contracts in excess of $500,000 or 0.5% of the utility's revenue, whichever is greater. As identified earlier, internal procurement procedures and the Board's option to request a review of an LDC's business case is adequate protection. In the absence of specific cost information, it is not possible to identify any net benefits that an independent evaluation may produce, particularly in circumstances where the results are clear and the transaction with the affiliate provides the greatest benefit.

2.3.3.6

Utilities provide a number of services to affiliates under the same terms and conditions as any other customer. These include such services as the billing for electricity, the connection of new services, settlement with embedded generators, the relocation of utility plant etc. As an example, the relocation of distribution plant in a road allowance as a result of the municipality's plans to widen the road would still be considered an affiliate transaction if the municipality owns the utility. However, the cost recovery for this work is mandated by the *Public Service Works on Highways Act*. In addition, a utility settling with an embedded generator owned by an affiliate does so under the terms of the Retail Settlement Code and therefore no further conditions should apply. The Electricity ARC should clarify that when the utility is providing these types of services under the same terms and conditions as it would any non-affiliated customer, the cost recovery requirements of that statute or code prevail over the Electricity ARC.

2.3.4 Where No Market Exists

This section provides clarification and consistency in the pricing of services, products, resources or asset use to or from Affiliates.

The addition of Section 2.3.4.3 requiring a utility to obtain details of the affiliate's cost determination whenever cost-based pricing is received would create additional administrative demands on the Affiliate and overall pricing. It is not clear as to what benefits will be realized from this additional work.

Furthermore, such information would clearly have to be protected from disclosure to commercial interests which are or could be competitors of the affiliate.

As an alternative, utilities could provide test cases to demonstrate that the sharing of costs were mutually beneficial and equitably applied (i.e., no cross-subsidization)

2.3.5 Shared Corporate Services

The addition of this section clarifies and aligns the cost-based pricing methodology for shared corporate services.

2.3.6 Transfer of Assets

The CLD understands the rationale for utility assets being sold or transferred to an affiliate being priced at the higher of market price or net book value. However, it is worth noting that this requirement goes beyond the no harm principle.

In a 2007 OEB Decision relating to cushion gas sales revenue (Union Gas Limited), the Board found that Union Gas Limited did not need to share any gain from this sale with utility customers. Referring to the ATCO case, the Supreme Court of Canada determined that "customers do not have an ownership interest in the assets of the utility. They have a right to receive services that involve the operation of the assets and must pay the costs associated with the services." In referring to this case, the Board could not identify any public interest that required protection; therefore, the utility was not obligated to allocate all or part of the proceeds, since the benefits were achieved at no harm to the customers.

As a result of these Decisions, a utility realizing a gain by transferring an asset to an affiliate at a market price above book value would not necessarily have to share that gain with utility customers.

2.6 Confidentiality of Confidential Information and Restriction on Provision of Strategic Business Information

The CLD is very concerned about the inclusion of "strategic business information" in this section. The definition of "strategic business information" is inadequate and not able to be practically implemented, since it in turn refers to vague and undefined concepts of 'identifying or providing' a 'business advantage or opportunity'. No test is provided to allow utilities to determine what information would be considered 'strategic'. The CLD submits that any information that would be provided to any party seeking information on the current or planned state of the distribution system could not be considered 'strategic'. In some cases, the information is required to be provided to fulfill legal plant-locate obligations.

For example, information on plans to reinforce or expand the distribution system is available and frequently provided to any customer or developer seeking this information. The addition of this requirement would put the utility in the untenable position of having to deny information to an affiliate that it readily provides to competitors of that affiliate. This would create undue harm to the affiliate.

Further, the CLD is concerned that this new section will mean that utilities may not hold corporate strategic planning meetings or any other type of corporate business meeting or provide information to a holding company or its municipal affiliate for legal governance obligations. The CLD believes this was not intended by the revision, but that is what it shall mean, as written.

It is not clear why this confidentiality provision would be required of the electricity industry, but was apparently not an issue when the Gas ARC was amended in December 2004. It is the view of the CLD that the 'confidential information' provision adequately satisfies any potential harm without the addition of "strategic business information".

Other

The proposed retroactivity date for Affiliate contracts signed post June 15, 2007 may create undesirable business impacts. As a minimum, the CLD submits that such requirements should not be made effective in advance of the OEB's Notice date of September 19, 2007.

The CLD concurs with the elimination of the Record Keeping and Reporting Requirements within the Electricity ARC and supports the decision that all licensed distributors are; otherwise, subject to the Electricity ARC requirements.

Thank you for the opportunity to comment. Three (3) paper copies, along with electronic Adobe Acrobat (PDF) and Word files accompany this submission.

Yours truly,

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(On behalf of the Coalition of Large Distributors)